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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 353

EMORY S. LAND, EDWARD MACAULEY, JOHN M. CARMODY, RAYMOND D. McKEOUGH, WILLIAM W. SMITH, RICHARD PARKHURST, GRENVILLE MELLEN and J. K. CARSON, JR.,

Petitioners,

vs.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE ROBERT DOLLAR CO., and H. M. LORBER,

Respondents.

Respondents' Memorandum Relative to Petitioners' Motion to Substitute.

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Respondents.

Respondents' Memorandum Relative to Petitioners' Motion to Substitute.

Upon filing the petition for certiorari the Solicitor General has also filed a motion to substitute Charles Sawyer in place of petitioners (the defendants). Concurrently with this memorandum respondents are filing their brief in opposition to the petition.

We respectfully suggest that this Court should not pass on the motion to substitute but should transmit it to the District Court, on remand of the case, for a ruling.

In 1946 defendants petitioned this Court for certiorari in this very case (No. 207, Oct. Term, 1946). Just as now, the petition

was accompanied by a motion to substitute new members of the United States Maritime Commission for former members as defendants. Respondents filed a memorandum consenting to the addition of the new members as defendants but objecting to substitution. Upon granting certiorari at that time, the Court added the new members but reserved decision as to the former members. When it later decided the case, it vacated its order so that the District Court could pass on the motion (*Land v. Dollar*, 330 U.S. 731 at 739).

By order of the District Court after remand the new members were "added as and made parties defendant herein, in addition to and not by way of substitution for any other defendant" (R. 51). The case thereafter proceeded against the old and the new defendants, all of whom now constitute the petitioners.

Petitioners predicate their motion to substitute on Section 9(b) of the Reorganization Act of 1949 (5 U.S.C. 133 z-7(b)). That statute has no application, for it relates to actions against "the head of any agency or other officer of the United States, in his official capacity or in relation to the discharge of his official duties."

This is not such an action. It is an action against defendants as individuals wrongfully withholding possession from respondents and thus committing a personal tort. (So held, *Land v. Dollar*, 330 U.S. 731, and see our brief in opposition to petition for certiorari filed contemporaneously with the present memorandum.)

Mr. Sawyer's letter of September 18, 1950 to the Attorney General (a copy of which is attached to the petition for certiorari and which is referred to in the motion to substitute) asserts that the shares of stock are now in his custody "in my official capacity of Secretary of Commerce." But this assertion as to the capacity in which he holds custody is no more than an erroneous conclusion of law. Anyone who sees fit to take possession from those who held it wrongfully and as individuals likewise holds it wrongfully as an individual and not as an official (*Land v. Dollar*, supra).

After remand it would be appropriate, but not necessary, to add Mr. Sawyer's name to the record as a defendant, and this can be done, not under Section 9(b) of the Reorganization Act, but under Rule 25(c), R.C.P.*

By taking possession from defendants during pendency of the suit to determine the right to possession, Mr. Sawyer has subjected himself to the final judgment without addition on the record of his name as a defendant. His name may be added of record as a party, but, whether it is or not he may be proceeded against as if a party, for once a court has taken cognizance of a controversy, no interference with consummation of the judgment by any *ad interim* transfer or change of possession will be allowed. *Lamb v. Cramer,* 285 U.S. 217; *Lacassagne v. Chapuis,* 144 U.S. 119; *Ex Parte Railroad Co.,* 95 U.S. 221, 226; *Wetherbee v. Dunn,* 36 Cal. 147; *New Jersey National Bank & Trust Co. v. Berkshire,* 156 Atl. 40, 9 N. J. M. 933; 34 Am. Jur. p. 363, Sec. 2; p. 375, Sec. 17.

But, while Mr. Sawyer may be added as a defendant after remand, he should not be substituted for the petitioners, thereby relieving them as defendants. They have already personally committed a tort by withholding possession from respondents at a time when they had custody of respondents' property. Moreover, after the remand in 1947 the District Court entered its order upon stipulation that, until the final determination of the case, the defendants would not, in any way, sell, transfer, or otherwise dispose of the possession or custody of any of the shares of stock (R. 53). Petitioners remain answerable.

Mr. Sawyer has had notice of that order. Copies of certain correspondence with him are attached to this memorandum. While

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*"In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule."

he would be bound even though no such order had ever issued (see authorities, supra), its existence is an added reason. *In Re Lennon*, 166 U.S. 548; *Walling v. Reuter Co.*, 321 U.S. 671; *Rivera v. Lawton*, 35 F.2d 823 (1st Cir.).

Respectfully submitted,

HERMAN PHLEGER
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GREGORY A. HARRISON
MOSES LASKY
CLINTON M. HESTER
MICHAEL M. KEARNEY
Attorneys for Respondents.

October 26, 1950.

(APPENDIX FOLLOWS)

Appendix

BROBECK, PHLEGER & HARRISON
Attorneys at Law
ONE ELEVEN SUTTER STREET
SAN FRANCISCO 4

Via Air Mail

May 31, 1950

Honorable CHARLES SAWYER,
Secretary of Commerce,
United States Department
of Commerce,
Washington, D. C.

Re: *Dollar v. Land*—No. 10299 United States Court of Appeals for the District of Columbia Circuit.

Dear Sir:

As you know, the above action is now pending in the United States Court of Appeals for the District of Columbia Circuit. The defendants are former members of the United States Maritime Commission, now terminated by Reorganization Plan No. 21 of 1950. This suit involves the right to possession of 92% of the voting stock of American President Lines, Ltd. represented by certificates of stock held in the custody of defendants or some of them. The defendants are represented in the action by attorneys in the Department of Justice. We represent the plaintiffs.

On June 11, 1947, an order was entered in the cause in the United States District Court for the District of Columbia that

> "until the final determination of this case, the defendants will not, nor will any of them, either directly or through any agents, assistants, deputies, or employees sell, transfer, or otherwise dispose of the possession or custody of any of the shares of stock which are the subject matter of this suit or of any of the certificates representing said shares of stock unless prior thereto they shall have given to the plain-

tiffs at least twenty days notice in writing of their intention to do so, so that plaintiffs may have an opportunity to apply to the Court for a restraining order or an injunction pendente lite or both."

The effect of the order was to enjoin any disposition of the custody of the stock and certificates so as to protect the jurisdiction of the courts in the suit to subject the stock to final judgment.

We do not know whether, in view of Reorganization Plan No. 21, any attempt has been or will be made to transfer the custody of the stock certificates to you or to someone under your supervision. If so, any custody so obtained by you will be subject to the foregoing order and to the ultimate judgment of the court.

Very truly yours,

BROBECK, PHLEGER & HARRISON
By MOSES LASKY.

ML:MS

cc: Honorable H. G. Morison
Assistant to the Attorney General

THE SECRETARY OF COMMERCE
WASHINGTON 25

June 16, 1950

MOSES LASKY, Esquire
Brobeck, Phleger & Harrison
Attorneys at Law
One Eleven Sutter Street
San Francisco 4, California

Dear Mr. Lasky:

Receipt is acknowledged of your letter of May 31, 1950, on the case of *Dollar v. Land*, action No. 10299 in the United States Court of Appeals for the District of Columbia Circuit.

I am sending a copy of this acknowledgment to the Attorney General of the United States.

Sincerely yours,

(Signed) CHARLES SAWYER
Secretary of Commerce

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CLERK

Nos. 353 and 552

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v.

R. STANLEY DOLLAR, ET AL.

CHARLES SAWYER, Secretary of Commerce, *Petitioner*

v.

R. STANLEY DOLLAR, ET AL.

EMORY S. LAND, ET AL., *Petitioners*

v.

R. STANLEY DOLLAR, ET AL.

MOTION FOR LEAVE TO FILE A BRIEF FOR *Amici Curiae* IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI AND FOR REHEARING

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